

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
March 24, 2008 Session

FRED THARPE v. EMERSON ELECTRIC COMPANY

**Direct Appeal from the Circuit Court for Henry County
No. 8935 Donald E. Parish, Judge**

No. W2007-01037-SC-WCM-WC - Mailed June 18, 2008; Filed August 22, 2008

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. Employee and Employer entered into a court-approved settlement agreement in 1988. The agreement required Employer to continue to provide medical treatment for the injury in accordance with the workers' compensation law. Employee received treatment from time to time. Employer paid for the treatment. In June 2006, Employer requested an independent medical examination of Employee. The evaluating physician concluded that current medical treatment was not related to the original work injury. Employer thereafter declined to provide further treatment. Employee filed this action. The trial court ordered Employer to continue to provide medical treatment. Employer has appealed. We affirm the judgment and remand to the trial court for further proceedings consistent with this opinion.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2007) Appeal as of Right; Judgment of the Circuit Court Affirmed and Remanded

ALLEN W. WALLACE, SR. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and DONALD P. HARRIS, SR. J., joined.

Richard L. Dunlap, III, Paris, Tennessee for the appellant, Emerson Electric Company.

David F. Hessing, Paris, Tennessee, for the appellee, Fred Tharpe.

MEMORANDUM OPINION

Factual and Procedural Background

Fred Tharpe ("Tharpe") suffered a back injury in 1985 while working for Emerson Electric Company ("Emerson"). He had surgery as a result of the injury. A court-approved settlement, entered in 1988, provided that Emerson would continue to provide medical treatment required by

the injury.

On October 2, 2002, Tharpe went to Dr. Blake Chandler, an orthopaedic surgeon in Paris, Tennessee, complaining of low back pain radiating into his right leg. Dr. Chandler's diagnoses were: "Post-laminectomy syndrome, lumbar spine" and "Degenerative disc disease, lumbar spine w/sciatica." Dr. Chandler ordered an EMG, which was normal, and prescribed pain medication. Tharpe remained in Dr. Chandler's care for three weeks.

Tharpe returned to Dr. Chandler in January 2003. Dr. Chandler's note concerning that visit contains this history:

The current problem began on or about 12/18/85. He is status-post lumbar discectomy, laminectomy and fusion at L4-L5 in 1886 (sic) and has had continued increasing pain in his low back. He follow-ups up (sic) with me for his continued symptoms and is on retired lifetime medical for his condition.

Documents from Dr. Chandler's file suggest that he was authorized by Emerson or its insurer to provide treatment to Tharpe.

Dr. Chandler gave Tharpe an epidural steroid injection in June 2003. This procedure was repeated in February 2004. Dr. Chandler also ordered physical therapy at that time. In March 2004, Dr. Amy Boyd, also of Paris, began to provide treatment to Tharpe. This may have been the result of a referral by Dr. Chandler. Dr. Boyd provided a series of epidural steroid injections over the next two months. Dr. Boyd's medical specialty is not revealed in the record. Tharpe returned to Dr. Chandler in June 2004. At that time, Dr. Chandler recommended that Tharpe be seen by a neurosurgeon.

Tharpe selected Dr. Joseph Rowland from a panel of neurosurgeons provided by Emerson. Dr. Rowland ordered an MRI, which showed degenerative disc disease. Dr. Rowland recommended additional epidural injections. The treatments were completed in December 2004. The injections were apparently of some benefit because Tharpe did not seek additional medical treatment until he returned to Dr. Chandler in November 2005. Dr. Chandler recommended another course of injections, undertaken in the early part of 2006.

In June 2006, Tharpe was examined, at Emerson's request, by Dr. Dirk Franzen. Dr. Franzen issued a report in which he opined that the surgeries performed for Tharpe's 1985 injury were not necessary. He also opined that Tharpe's "ongoing complaints are not related to his original injury and are more secondary to a degenerative aging process with a questionable component coming from his knee."

Based upon Dr. Franzen's opinion, Emerson did not authorize any additional medical care for Tharpe's back, prompting Tharpe to file this action. The trial court found that medical care received by Tharpe after Emerson ceased to provide treatment was related to the original injury. It ordered Emerson to pay for that care and to continue to provide medical treatment to Tharpe. The court designated Dr. Chandler as the authorized physician for future medical treatment. It awarded

attorney's fees and discretionary costs to Tharpe.

Emerson has appealed from that order, contending that the trial court erred by ordering Emerson to provide for medical treatment. In addition, Emerson raises issues concerning the cost of appellate mediation. Tharpe contends that the trial court's ruling was correct, and requests that Emerson be required to pay his attorney's fees on appeal.

Standard of Review

The standard of review of issues of fact is *de novo* upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2007). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987). A reviewing court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997); *Landers v. Fireman's Fund Ins. Co.*, 775 S.W.2d 355, 356 (Tenn. 1989). "Any reasonable doubt as to whether . . . an injury arose out of employment is to be resolved in favor of the employee." *Phillips v. A & H Constr. Co.*, 134 S.W.3d 145, 150 (Tenn. 2004). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. *Ridings v. Ralph M. Parsons Co.*, 914 S.W.2d 79, 80 (Tenn. 1996).

Analysis

1. Medical Treatment

Emerson's brief is terse and somewhat obscure. Emerson's position appears to be that Dr. Franzen's report should be accorded greater weight than the other medical evidence because it addresses the relationship between the medical care being sought and the original injury more directly than the other medical records. However, the language of Dr. Chandler's records, quoted above, clearly assumes a causal relationship between the symptoms that he treated and the original injury. In addition, both his records and those of Dr. Boyd repeatedly diagnose Tharpe's condition as "post-laminectomy syndrome." It is undisputed that the laminectomy in this case was undertaken as a result of the original injury. Based upon the foregoing, we conclude that the evidence does not preponderate against the trial court's ruling.

2. Mediation Expenses

Emerson contends that Tharpe should have to bear 50% or more of the expense of mediation because Tharpe “refused to waive the Mediation.” Under Tennessee Supreme Court Rule 37, mediation is ordered unless a party objects under Section 4 of Rule 37. Rule 37 does not permit the parties in a workers’ compensation appeal to “waive” mediation. Although Emerson raises this issue and has attached to its brief some correspondence between counsel on the subject of mediation, it does not present any argument or authority in support of its position. This argument is without merit.

The mediator in this case requested, in his report, that his fee be taxed as costs on appeal. Pursuant to section 10 of Rule 37, that request is granted.

3. Attorney’s Fees on Appeal

Tenn. Code Ann. § 50-6-204(b)(2) provides:

In addition to any attorney fees provided for pursuant to the provisions of § 50-6-226, a court may award attorney fees and reasonable costs to include reasonable and necessary court reporter expenses and expert witness fees for depositions and trials incurred when the employer fails to furnish appropriate medical, surgical and dental treatment or care . . . to an employee provided for pursuant to a settlement or judgment under this chapter.

In *Seiber v. Methodist Med. Ctr. of Oak Ridge*, No. 03S01-9801-CV-00006, 1999 WL 178627, *5 (Tenn. Workers’ Comp. Panel Mar. 25, 1999), a previous panel interpreted this language to include award of attorneys fees incurred in pursuing an appeal on the issue of medical care. This is consistent with the purpose of that section. See *Dunn-Lindsey v. Wal-Mart Stores, Inc.*, No. W2002-02742-WC-R3-CV, 2003 WL 22351027, *3 (Tenn. Workers’ Comp. Panel Oct. 9, 2003). We therefore remand the case to the trial court to determine the appropriate amount of attorney’s fees to be awarded to Tharpe.

Conclusion

The judgment is affirmed. The case is remanded to the trial court for further proceedings consistent with this opinion. Costs, including the costs of Rule 37 mediation, are taxed to the appellant, Emerson Electric Company, and its surety, for which execution may issue if necessary.

ALLEN W. WALLACE, SENIOR JUDGE

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**Circuit Court for Henry County
No. 8935**

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JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Emerson Electric Company, pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Emerson Electric Company, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Holder, Janice M., J., not participating